Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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I. INTRODUCTION AND SUMMARY

From reading the CLECs' comments, one would think that there was no need for this remand proceeding. They argue that the D.C. Circuit "*rejected* the Commission's efforts to apply its end-to-end jurisdictional precedent to the reciprocal compensation context."[1] They claim that the court "*determined*" that the Commission's regulatory definition of termination supports the conclusion that Internet service provider (ISP) traffic is subject to reciprocal compensation, and that "the Commission *must heed the D.C. Circuit's conclusion* on remand."[2] And they assert that "[t]he court ... *makes clear* that the question whether ISP-bound traffic is subject to reciprocal compensation turns solely on whether it is telephone exchange service ...or exchange access"[3]

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1 WorldCom Comments at 2. *See also* ICG Comments at 2; CLEC Coalition Comments at 2; Comments of Focal *et al.* at 4; Pac-West Comments at 15, 17.

2 WorldCom Comments at 17.

3 ICG Comments at 5. *See also* WorldCom Comments at 8.

and *requires* the Commission to "summarily order reciprocal compensation for ISP-bound traffic."[4]

The court, of course, did no such thing. While it questioned the merits of the Commission's analysis, it did not reject that analysis or any of the conclusions derived therefrom. It simply found that the Commission had not satisfactorily explained itself.

That the CLECs feel compelled to recast the D.C. Circuit's opinion from a remand to a reversal is hardly surprising. When your strategy is to obscure, not illuminate, to direct attention away from, rather than towards, the real issues, your first shot is often your best and only shot. Even the CLECs must realize that you cannot wish away fifty-plus years of precedent and that distractions, such as the definition of "telephone exchange service," are not likely to survive the light of a second examination.

Nevertheless, they persist in their campaign of disinformation.[5] Their aim, if truth be told, is not so much to convince the Commission of their flimsy arguments; they have little hope of that. Their aim is to create enough of a fog to confuse the D.C. Circuit once again.

The Commission should not let that happen. At bottom, this proceeding raises one straightforward question: is Internet traffic local telecommunications traffic that terminates at the ISP server? The answer is not hard; it is dictated by a principle to which the Commission

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[4] ICG Comments at 3.

[5] Not every CLEC does so. The Rural Independent Competitive Alliance, a coalition of rural CLECs notes "that a long term policy cannot be build on a situation where the originating carrier charges its customers a fixed amount per month, but pays a per minute charge to the terminating carrier for a substantial portion of its traffic." *See* Rural Independent Competitive Alliance Comments at 3.

The consumer and user groups that filed comments also argue that reciprocal compensation should not be paid for ISP traffic. *See* GSA Comments; Alliance for Public Technology Comments; Comments of Keep America Connected *et al.*

and the courts have adhered unfailingly for decades – that the boundaries of a communication are determined on an end-to-end basis.

The CLECs perform rhetorical somersaults trying to wish away this principle. They claim it is a jurisdictional principle only. But that is wrong, and try as they might to ignore *Teleconnect* and its progeny, or in the case of AT&T, to transform that case into a jurisdictional case, the case establishes a clear precedent for this proceeding.

The CLECs also make much of the access charge exemption. But the access charge exemption does not support their claim, either as a legal or an economic matter. From a legal standpoint, it only confirms that ISP traffic is access traffic, not local traffic; otherwise, as the Commission has recognized, the exemption would not be necessary. And from an economic standpoint, the exemption is nothing more than a price break for ISPs: a means by which they are permitted to pay business line rates for the access services they use. The fact that they pay business line rates for their access services does not mean that they stand in the shoes of an ordinary end user. The critical distinction between ISPs and ordinary end users is that the business line rates that ordinary end users pay are deemed to recover the costs of their *origination* of traffic, while the business line rates that ISPs pay are deemed to recover the costs of their *receipt* of traffic – the very costs for which CLECs seek reciprocal compensation.

CLECs additionally rely heavily on the Commission's definition of "termination" and the statutory definition of "telephone exchange service." These arguments are just distractions. The Commission's definition of termination applies, by its very terms, only to "local telecommunications traffic" that is delivered to the "called party." ISP traffic is not local telecommunications traffic, and the ISP is not the called party. Likewise, the definition of

"telephone exchange service" is nothing more than a red herring because neither Section 251(b)(5), the Commission's implementing regulations, nor the relevant paragraphs of the *Local Competition Order* even mention that term.

The CLECs offer other arguments as well. Along the way, they rewrite the law, reshape the facts, and offer an *Alice in Wonderland* version of public policy. This is not Wonderland, though. This is the real world. In the real world, ISP-bound traffic is not by law subject to the reciprocal compensation provisions of the Act, and the extension of reciprocal compensation to such traffic is antithetical to several key goals of the 1996 Act. The Commission should so rule.

II. ARGUMENT

A. The Reciprocal Compensation Provisions of the Act Do Not Apply to ISP-Bound Traffic Because ISP Traffic Does not Terminate at the ISP Server.

Section 251(b)(5) requires reciprocal compensation for the transport and termination of local telecommunications traffic. The Commission's rules define "local telecommunications traffic" as "telecommunications traffic ... that originates and terminates within a local service area." Thus this case hinges on one question, and one question only: does Internet-bound traffic terminate at the ISP server.

As SBC showed in its initial comments, the answer to this question is dictated by a legal principle to which the Commission and the courts have adhered unfailingly for over fifty years – namely, that the boundaries of a communication by wire or radio are determined on an end-to-end basis.

So settled is this precedent that even the CLECs can no longer wish it away. Thus, they have abandoned their previous opposition to ILEC claims that ISP traffic is interstate traffic. They now concede that, at least for jurisdictional purposes, ISP traffic does *not* terminate at the

ISP server. They go so far as to endorse the Commission's holding in the GTE xDSL Tariffing Order, which they previously opposed. As AT&T states:

> there is no question that ISP services, and the LECs' carriage of ISP-bound traffic, are within the Commission's jurisdiction over interstate communications by wire or radio. The facts that establish this jurisdiction are very straightforward, and were a basis for the Commission's recent determination that DSL services are "exchange access" when they originate communications to out-of-state web sites. ...
>
> In addition to the use of DSL, cable, or other dedicated connections to an ISP, customers can access the ISPs' networks of interexchange facilities by dialing the local telephone number of the ISP's local node or servers. That local call, strictly speaking, is routed to the central office of the LEC that serves the ISP, where the call is switched onto a private line that leads to the ISP's local server ... [which] is a packet switch that routes communications from the calling party to one or more centrally-located computers on the ISP's network or to one or more websites on the public Internet. ...
>
> The local exchange facilities [used to access the ISP server] are thus essential links in a series of sequential or simultaneous interstate, end-to-end communications, each of which occurs between the end users and interstate destinations.[6]

AT&T goes on to explain that this end-to-end analysis applies, not only to telecommunications service used to access traditional long-distance services, but also to telecommunications services that are used to access enhanced or information services. Discussing the *BellSouth MemoryCall Order,* it notes: "As with traditional telecommunications traffic, the fact that there may be intermediate points of switching or exchange is irrelevant to the analysis."[7] It even points out that the D.C. Circuit failed to appreciate the significance of the

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[6] AT&T Comments at 7-8.

[7] *Id.* at 9.

Teleconnect case and asserts that the communication at issue in *Teleconnect* is directly analogous to ISP traffic:[8]

> [c]ontrary to the suggestion in the D.C. Circuit's opinion (206 F.3d at 6), the service in *Teleconnect* no more 'involved a single continuous communication' than do the ISP services at issue here. Once an end user reaches an interexchange carrier's calling card platform, he or she is free to make a series of calls to a number of recipients, just as an end user is free to obtain connections to multiple web sites after it reaches an ISP's local server. Thus, while *Teleconnect* did not involve information services and reciprocal compensation, its jurisdictional holding is controlling and there is no question that the Commission's prior determination of jurisdiction is correct.

Nor is AT&T alone in conceding that ISP-bound traffic does not terminate at the ISP server, at least for jurisdictional purposes. All of the CLEC commenters concede that ISP-bound traffic is jurisdictionally interstate. In fact, Global NAPs goes further still, conceding that ISP traffic is, for purposes of the Commission's regulations, a service "provided for the origination or termination of any interstate or foreign telecommunication[.]"[9]

But while the CLECs unanimously concede that: (i) the jurisdiction of Internet traffic should be based on an end-to-end analysis, and that (ii) under that analysis, Internet traffic does not terminate at the ISP server, they nevertheless claim that the jurisdiction of ISP-bound traffic has nothing to do with its status under the reciprocal compensation regime.[10]

They are wrong. The fact of the matter is that the jurisdictional analysis of ISP traffic is *inextricably* linked to its status for reciprocal compensation purposes under Section 251(b)(5) and the Commission's regulations. The Commission has held that the reciprocal compensation

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[8] *Id.* at 10, *citing Teleconnect Co. v. Bell Telephone Co.,* 10 FCC Rcd 1626 (1995), *aff'd 116 F.3d 593 (D.C. Cir. 1997).*

[9] *See* Global NAPs Comments at 7.

[10] AT&T Comments at 10-11; WorldCom Comments at 1; Time Warner Comments at 6; ICG Comments at 2; ALTS Comments at 5.

provisions of the Act apply only to the transport and termination of "local telecommunications traffic." The Commission's regulations define the term "local telecommunications traffic," as "telecommunications traffic that originates and terminates within a local service area." Thus, just as the jurisdictional status of ISP-bound traffic hinges on where that traffic originates and terminates – and, in particular, whether Internet-bound traffic terminates at the ISP server - so does the status of that traffic under the reciprocal compensation regime. In this respect, the jurisdictional analysis of Internet-bound traffic is not merely linked to its status under the reciprocal compensation regime, it is controlling.

The CLECs nonetheless argue that an "end-to-end" analysis is appropriate only for jurisdictional determinations.[11] This is nothing more than wishful thinking. The end-to-end analysis has never been confined to questions of jurisdiction. Rather, as SBC and others showed in their comments, it has been used to gauge the boundaries of communications by wire or radio both for regulatory and jurisdictional purposes. In fact, notwithstanding AT&T's attempt to pass off the *Teleconnect* case as a jurisdictional case, neither that case, nor the litany of cases that

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[11] AT&T purports to find support for this argument from the Act's definition of "wire communication." AT&T Comments at 8. It argues the end-to-end analysis used in jurisdictional determinations derives from the Act's broad definition of "wire communication," which encompasses a communication by wire from its point of origin to its point of reception. This is a *nonsequitur*. While the definition of "wire communication" supports the notion that a wire communication should be defined on an end-to-end basis, nothing in the Act suggests that this end-to-end analysis is relevant only for jurisdictional purposes. If anything, the definition of wire communication suggests that a wire communication should be defined on an end-to-end basis for *any* purpose, including for the purposes of this proceeding. That point is underscored by the fact that the term "telecommunications" also is defined broadly and in a manner that suggests telecommunications must be viewed on an end-to-end basis. Specifically, it is defined as the transmission of information between <u>or among</u> points of the end user's choosing ... Insofar as this definition defines telecommunications as extending through multiple points, it confirms the applicability of an end-to-end analysis in any context in which the boundaries of telecommunications must be determined. *See* 47 U.S.C. § 153(43).

followed in its footsteps, had anything to do with jurisdiction.[12] Rather, in each of these cases, the Commission applied an end-to-end analysis to determine the boundaries of a communication for regulatory purposes, including, in many of these cases, the resolution of *inter-carrier compensation* disputes. Indeed, in the *Teleconnect* case the Commission expressly *rejected* arguments that the end-to-end analysis is limited to jurisdictional determinations, holding that there was no basis for such a limitation:

> While Nevada Bell and Pacific Bell attempt to distinguish the so-called 'jurisdictional' nature of a call from its status for 'billing' purposes, they present no persuasive argument nor any authority to support their contention that this distinction has legal significance.[13]

The *Teleconnect* case – which was upheld on appeal – is correct. There is no principled basis upon which to limit end-to-end principles to jurisdictional determinations. If a communication terminates at a particular point for jurisdictional purposes, it necessarily terminates at that same point for regulatory purposes. That has always been the law, and the CLECs do not show otherwise. In fact, what is most telling about their comments is that, while they purport to dismiss the relevance of the end-to-end analysis, they fail to identify a single instance in which any other construct has been used to determine the boundaries of a communication. The reason is simple: there is none. For more than fifty years, this has been the *only* construct used to determine the boundaries of a communication, irrespective of the purpose of the inquiry. That being the case, the end-to-end analysis used in the *Teleconnect* case

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12 *See* SBC Comments at 12.

13 *Teleconnect v. Bell Telephone Co. of Pa.*, 10 FCC Rcd 1626 (1995) at para. 12.

controls, not only the jurisdiction of ISP traffic, as AT&T claims, but also the status of ISP traffic under the reciprocal compensation regime.[14]

B. The Law Does Not Otherwise Require that Reciprocal Compensation Be Paid for ISP Traffic.

Although, as shown above and in SBC's Comments, the end-to-end analysis applied in the *Reciprocal Compensation Ruling* is controlling, CLECs claim that this proceeding must be decided on some other basis. They claim, in particular, that: (1) reciprocal compensation must be paid for all traffic that is not subject to traditional access charges; (2) Section 51.701(d) requires that reciprocal compensation be paid for ISP traffic; and (3) ISP-bound traffic is telephone exchange service. They also make a number of other arguments. As shown below, none of these arguments has merit.

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[14] In addition to arguing that the end-to-end analysis applies only to jurisdictional determinations, CLECs offer two other arguments in their effort to show that the jurisdiction of ISP traffic is irrelevant to a determination of whether that traffic is local traffic. First, pointing to calls from Washington, D.C. to Arlington, Virginia, a number of CLECs claim that the fact that a call is interstate does not mean that it is not local. *See* Focal Comments at 14; ICG Comments at 13; Global NAPs Comments at n. 23. Second, CLECs claim that because the Commission has been given authority to establish rules implementing section 251, its authority no longer hinges on whether a communication is local or interexchange.

Both arguments are frivolous. Calls from Washington, D.C. to Arlington are both interstate and local because, on an end-to-end basis, they originate and terminate in different states but within the same local service area. In contrast, ISP-bound traffic does not, as a general matter, originate and terminate within the same local service area and is, therefore, not like calls from Washington to Arlington.

As for the second argument, the point of the Commission's jurisdictional analysis was, not to address whether the Commission has the authority to regulate ISP traffic; the point of that analysis was to determine which source of authority applies: the Commission's authority to regulate interstate traffic pursuant to Title II of the Act or the Commission's authority to subject local telecommunications traffic to reciprocal compensation.

1. The Reciprocal Compensation Provisions of the Act Apply Only to "Local Telecommunications Traffic." The Status of that Traffic Under the Access Charge Regime is Irrelevant.

A core argument of the CLECs is that the *Reciprocal Compensation Ruling* cannot be squared with the status of ISP traffic under the access charge regime. They argue that Section 251(b)(5) requires reciprocal compensation for the transport and termination of *all* telecommunications. They claim that the Commission has, *by regulation,* established an exception to the statute's plain terms for "traditional interexchange traffic" "in order to preserve the existing system of 'access charges' in which interexchange carriers compensate the originating and terminating LECs for their services at rates that purportedly contribute to the maintenance of universal service."[15] They argue that ISP-bound traffic is outside the scope of this exception because it is not traditional interexchange traffic to which the existing system of access charges applies.[16] They claim, therefore, that the Commission's rules require the application of reciprocal compensation to ISP-bound traffic.

This argument mischaracterizes the basis for and the scope of the Commission's reciprocal compensation rules. It also proceeds from the false premise that the denial of reciprocal compensation for ISP traffic would be inconsistent with the access charge exemption.

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[15] AT&T Comments at 11: ALTS Comments at 10 (FCC limited reciprocal compensation obligations to avoid disrupting the access charge regime); Focal Comments at 11; Pac-West Comments at 15-16.

[16] *Id.* AT&T claims that the Commission's conclusion that section 251(b)(5) applies only to local telecommunications traffic is inconsistent with the text of that provision and should be vacated. AT&T, however, contradicts its own argument by acknowledging that section 251(g) permits the Commission to preserve the access charge regime. AT&T Comments at 12-13. AT&T also fails to recognize that the Commission's interpretation of section 251(b)(5) is fully supported by section 251(i).

a. CLECs Mischaracterize the Basis for and Scope of the Commission's Reciprocal Compensation Rules.

The CLEC argument that the Commission limited by regulation the scope of Section 251(b)(5) to traffic that is not subject to the Part 69 access charge regime is wrong in at least two respects. First, the Commission did not *limit* Section 251(b)(5); it has no authority to limit a statutory right, except through forbearance. Rather, the Commission *interpreted* the scope of Section 251(b)(5). It held that "*the Act* preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic."[17]

Second, the Commission did not read Section 251(b)(5) to apply to all traffic that is not subject to interexchange carrier (IXC) access charges. Rather, it interpreted that provision to apply to "*local telecommunications traffic.*" As noted, it defines the term "local telecommunications traffic," - not with reference to the access charge regime - but as "[t]elecommunications traffic ... that originates and terminates within a local service area[.]" Thus, the status of a call under the Commission's access charge regime is not, in itself, relevant to its status under the Commission's reciprocal compensation rules. The only thing that matters is where that call originates and terminates.

Significantly, and contrary to the CLECs' claims, the text of the rule is fully consistent with the stated intent of the *Local Competition Order.* Although the Commission certainly discussed IXC access charges in that order, the Commission never said that reciprocal compensation should be paid whenever IXC access charges are not. Rather, consistent with its rule, it said that reciprocal compensation should be paid for local traffic but not for interstate

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[17] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499 (1996) at para. 1033 (emphasis added).

traffic. Moreover, the Commission based this conclusion on a *structural* analysis of the statute. It found that the reciprocal compensation provisions of the Act do not apply to interstate traffic because that traffic is subject by law to a different compensation regime – namely, the Commission's authority under Sections 201 and 202:

> We conclude, ... as a legal matter, that transport and termination of local traffic are *different services* than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are *governed* by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are *governed* by Sections 201 and 202.[18]

Thus, under the Commission's analysis, the manner in which the Commission exercises its authority under Sections 201 and 202 is irrelevant. What matters is that ISP traffic is interstate traffic. As such, it is *subject to* the Section 201/202 regime and, therefore, *not subject to* the reciprocal compensation regime.

The Commission's determination that Section 251(b)(5) does not apply to traffic that is subject to the Section 201/202 regulatory regime is grounded firmly in Section 251(i), which provides that the Commission's authority under Section 201 shall not be limited or affected by anything in Section 251.[19] Quite obviously, the Commission's authority would be "limited or affected" if ISP-bound traffic – which the CLECs now admit is interstate traffic - were subject to Section 251(b)(5). It would mean, for example, that the Commission could not lift the access charge exemption if it chose to do so. It would mean, even, that the Commission would be

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[18] *Id.* (emphasis added). The Commission's authority to regulate ISP-bound traffic should not be confused with its authority to regulate the services provided by ISPs to their subscribers. The Commission has authority over ISP-bound traffic under Title II of the Act, including section 201. It does not regulate Internet information services under Title II.

[19] Section 251(i) provides: "Nothing in [section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201."

powerless to implement an alternative access charge regime – for example, a flat-rated, cost-based access charge.[20] Those kinds of limits on the Commission's authority, which would flow inevitably from the application of Section 251(b)(5) to ISP-bound traffic, simply cannot be reconciled with Section 251(i).

b. The Reciprocal Compensation Declaratory Ruling is not Inconsistent with the Access Charge Exemption.

While the Commission's reciprocal compensation rules do not, and were not intended to, require reciprocal compensation for anything other than "local telecommunications traffic," CLECs claim that, as a matter of economics, the access charge exemption compels a different result. They claim that "for almost two decades, calls to ISPs have been treated no differently than any other local calls to any other end user"[21] and that the "[t]reatment of ISP-bound traffic as local for purposes of tariffing, ratesetting and separations but not for purposes of reciprocal compensation would introduce an arbitrary and potentially crippling anomaly into the Commission's current ESP exemption regime."[22] They argue, in particular, that CLECs would be denied any means to recover their costs of serving their ISP customers.

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[20] It is not enough to say that the reciprocal compensation provisions of the Act would no longer apply if and when the Commission subjects ISPs to the access charge regime because, in the meantime, LECs would have entered into interconnection agreements implementing the requirements of section 251(b)(5). Those interconnection agreements would remain in effect even after a Commission decision unless and until any change of law provision could be invoked. Not every agreement contains a change of law provision, however, and the terms of those provisions, to the extent they exist, vary. Thus, even under this scenario, the Commission's authority under section 201 would be affected.

[21] WorldCom Comments at 32. *See also* Cablevision Comments at 5-6.

[22] AT&T Comments at 16; Global NAPs Comments at 14-16; Focal Comments at 18.

These arguments mischaracterize the access charge exemption and ignore the differences between ISP traffic and local traffic. While ISP traffic is treated in *some* respects like local traffic pursuant to that exemption, there are critical differences between ISP traffic and local traffic. One such difference is that ISP traffic, unlike local traffic, is subject to the special access surcharge.[23] This surcharge, which "*is designed solely to compensate for the use of the local exchange,*"[24] in itself, belies claims that ISP traffic is treated "no differently than any other local call."

Another, more fundamental difference between ISP traffic and local traffic has to do with the construct under which the pricing arrangements are viewed for each. As CLECs note, local traffic is assumed to be "sent paid" traffic. Reciprocal compensation is required for local traffic so that "the LEC that actually completes a call handed off from another LEC can get paid for what it does[.]"[25] ISP-bound traffic, in contrast, has *never* been viewed under this rubric. To the contrary, even under the access charge exemption, the Commission has always assumed that the

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[23] *See MTS and WATS Market Structure,* 97 FCC 2d 682, 711 (1983):

> Among the variety of users of access service are ...enhanced service providers, and other private line and WATS customers, large and small, who "leak" traffic into the exchange. In each case, the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area. At its own location the user connects the local exchange call to another service or facility over which the call is carried out of state. ... [An] enhanced service provider might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities to access its customers. Hereafter we shall use the term "leaky PBX" to denote the generic problem just described, whether the "leak" occurs through a PBX or through another mechanism or instrumentality.

[24] *Id.* at n. 68. *See also id.* at para. 81: "This charge is intended to be a surrogate for the carrier common line charges or similar charges we would otherwise impose."

[25] Global NAPs Comments at 11-12.

ISP pays for the access services it uses – albeit through a different regime than the Part 69 access charge regime.

The Commission has made this clear time and again since establishing the access charge exemption. Repeatedly, it has characterized the access charge exemption as a *pricing* decision – *i.e.*, a decision that enhanced service providers should have the option of paying state-determined business line rates for the access services they use. For example, in one of the original access charge orders, the Commission noted that local business line rates paid by enhanced service providers are deemed to recover the cost not only of the line between the enhanced service provider's premises and LEC's local switch, but also the switching function used to deliver interstate traffic to the enhanced service provider.[26] Likewise, in its 1987 Notice of Proposed Rulemaking, in which the Commission tentatively concluded that it should eliminate the access charge exemption, the Commission reiterated its understanding that enhanced service providers pay for the access services they use, expressing its concern "that the charges currently paid by enhanced service providers do not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public."[27]

More recently, in the *Access Reform Order*, the Commission, not only reiterated its understanding that ISPs contribute to the costs of the access services they use, but suggested that, to the extent a LEC was not fully recovering its costs of serving its ISP customers, it should seek permission from the states to raise its ISP rates: "To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers

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26 *MTS and WATS Market Structure,* 97 FCC 2d 682 at para. 88.

27 *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking,* 2 FCC Rcd 4305, 4306 (1987).

with high volumes of *incoming* calls, incumbent LECs may address their concerns to state regulators."[28]

Significantly, it is not just the Commission that has characterized the access charge exemption as simply a different compensation mechanism pursuant to which the ISP pays. The D.C. Circuit itself has described the exemption in these terms, noting in its order upholding the exemption that "the *access charges paid by ...ESPs* may thus not fully reflect their relative use of exchange access."[29]

The fact that the access charge exemption is recognized to effect what is, in essence, simply a lower access charge on ISPs belies CLEC claims that ISP traffic is indistinguishable from local traffic for reciprocal compensation purposes. Unlike local traffic – which is assumed to be subject to a calling party pays model – ISP traffic is subject to an ISP-pays model.[30]

Moreover, this difference between ISP traffic and local traffic is not merely a matter of regulatory theory. As Global NAPs notes, ISPs as a group subscribe to more telephone lines than all but the largest cities and many states.[31] Why is this revenue – which, after all, is paid to carriers who perform one function only for ISPs: the transport and delivery of traffic – irrelevant to reciprocal compensation considerations? Certainly it could not be characterized as revenue

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[28] *Access Charge Reform,* 12 FCC Rcd 15982, 16134 (1987) (emphasis added). SBC emphasizes the word "incoming" to demonstrate that the Commission was speaking of ISP rates, not consumer rates.

[29] *National Association of Regulatory Utility Commissioners v. FCC,* 737 F.2d 1095, 1136 (D.C. Cir. 1984) (emphasis added).

[30] The *Reciprocal Compensation Ruling* states "our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that reciprocal compensation, suggest that such compensation is due for that traffic." *Reciprocal Compensation Ruling* at para. 25. For the reasons discussed above, this is not an accurate statement and should be corrected on remand.

[31] Global NAPs Comments at 2.

collected for originating traffic functions, as is the case with ordinary end users, since ISPs do not make any phone calls over these lines. There is only one way to view this revenue and that is as compensation for the one function that a LEC serving an ISP provides to that customer: the transport and delivery of traffic. That being the case, there is no basis for CLEC claims that they require reciprocal compensation as well. Their empty rhetoric about the re-monopolization of the ISP market notwithstanding,[32] what they are seeking in this proceeding is not cost recovery, but *double recovery.*

2. Section 51.701(d) of the Commission's Rules Does Not Require That Reciprocal Compensation Be Paid for ISP-Bound Traffic.

CLECs argue further that the conclusion in the *Reciprocal Compensation Ruling* that ISP traffic does not terminate at the ISP server is inconsistent with Section 51.701(d) of the Commission's rules.[33] Tripping all over themselves as they purport to explain why ISP traffic terminates at the Internet for jurisdictional purposes, but at the ISP server for reciprocal compensation purposes,[34] they argue, in essence, that Section 51.701(d) defines termination with reference to "functions," not end points. As stated by the CLEC Coalition:

> the Commission's fundamental error in the *Reciprocal Compensation Ruling* was to bypass its own definition of what it means to "terminate" a call for

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32 *Id.* at 15-18.

33 Section 51.701(d) of the Commission's rules defines termination as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."

34 Consider the following from ICG: "It is thus clear from the D.C. Circuit's opinion that, while calls to ISPs may be jurisdictionally interstate when viewed end-to-end as a series of linked communications, they nevertheless fall within the telephone exchange service definition because the original telecommunications from the end user to the ISP terminates at the ISP. ICG Comments at 10.

> reciprocal compensation purposes in favor of a jurisdictional analysis based on the physical end-point of a call. Thus, the basic point that the Act provided for compensation to a LEC for performing the "termination" functionality somehow got lost in the effort to determine the jurisdictional nature of ISP-bound traffic. As the Court concluded, the jurisdictional nature of ISP traffic does not appear to have a bearing on whether or not such traffic is telecommunications traffic subject to reciprocal compensation under Section 251(b)(5). Rather, it is the functionality of service provided – for which compensation is due – that is relevant.[35]

Similarly, after describing the functions performed by a LEC when it delivers traffic to an ISP, and quoting Section 51.701(d), WorldCom claims "[t]he functions the CLEC performs falls within the meaning of termination."[36]

These arguments misread Section 51.701(d). While that rule does, as SBC noted in its Comments, define the termination "function," it does not define "termination" *solely* with respect to functionality. Rather, by its express terms, it makes clear that, for reciprocal compensation purposes, the termination functionality must be provided in connection with "local telecommunications traffic" that is delivered to the "called party."

These limitations in Section 51.701(d) are made clear, as well, in the *Local Competition Order*. Indeed, that order expressly rejects the notion that "termination" should be defined strictly in terms of the functionality provided. As the Commission observed, under a purely functional definition of "termination," access traffic, as well as local traffic, would be subject to reciprocal compensation:

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35 CLEC Coalition Comments at 7.

36 *See, e.g.*, WorldCom Comments at 24. *See also* Time Warner Comments at 8 ("While it may be that the underlying telecommunications for an Internet-bound call begins at the ISP subscriber and continues through to the ISP and onto the Internet, making the end point for the jurisdictional analysis the Internet server(s), the point of "termination" for reciprocal compensation purposes is simply the point at which the call is switched and delivered to the non-carrier called party (e.g., the ISP) (emphasis in original).)

> We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. ... We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act.[37]

Notably, while some CLECs take pains to demonstrate that they provide a termination "functionality," they fail to show either that the ISP is the called party or that ISP traffic is local telecommunications traffic. With respect to the first issue, the *only* support they can muster is the assertion that the D.C. Circuit definitively concluded that the ISP is the called party. But that is wrong. The court reached no definitive conclusions about anything. It offered questions, not answers.

To be sure, the court's opinion could be read to suggest that the court believes the ISP to be the called party. To the extent that is true, it is undoubtedly because the court was proceeding from the premise that Section 51.701(d) defines termination solely as a "functionality." As noted above, this is a false premise, one that is inconsistent both with the language of the rule itself and paragraph 1033 of the *Local Competition Order*. The Commission should make that clear in its order on remand.

The Commission also should point out the inherent inconsistency between the CLECs' jurisdictional concession and their claim that the ISP is the called party. In discussing the jurisdictional nature of ISP traffic, CLECs repeatedly concede that ISPs allow their subscribers to communicate with distant points on the Internet. As AT&T notes, "calls to ISPs typically

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[37] *Local Competition Order* at para. 1033.

result in direct, nearly instantaneous communications between the calling party and one or more websites located in other states."[38] And again: "Information travels over [the local facilities between the end user and the ISP] as part of the communications between the end user and each of [sic] interstate or foreign websites that the *end user* contacts."[39] These concessions simply cannot be reconciled with the claim that the ISP is the "called party." It is, in fact, no more the called party than was Teleconnect, when users dialed an 800 number to connect to Teleconnect's switch before placing a separate long-distance call. Significantly in the *Teleconnect* case, the Commission specifically referred to the person at the ultimate end point of the communication -- not the intermediate switching point - as the "called party." The same is true for ISP traffic.

As for the second issue – *i.e.* the issue of whether ISP traffic is local telecommunications traffic, as defined in Section 51.701(b)(1) of the Commission's rules, CLECs are mostly silent. A few CLECs, though, purport to address this issue with reference to Section 51.701(d). Specifically, noting that "local telecommunications traffic" is defined in Section 51.701(b)(1) as "telecommunications traffic ...that originates and terminates within a local service area," they argue that the term local telecommunications traffic simply means traffic for which originating and terminating functionalities are performed within the same local service area.[40]

This argument must be rejected for two reasons. First, as noted, Section 51.701(d) requires that the "termination" function involve the delivery of traffic to the "called party," and

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38 AT&T Comments at 5.

39 *Id.* at 7-8.

40 *See, e.g.,* WorldCom Comments at 17; CLEC Coalition Comments at 7 (the definition of local telecommunications traffic "makes the most sense if the term 'terminates' is construed as a functionality or service provided by the LEC serving the called party (an ISP, in this case), as opposed to an ultimate end-point of a communication.")

the ISP is not the "called party."[41] Second, assuming *arguendo* that the ISP were the "called party" for purposes of Section 51.701(d) – which is not the case – the definition of "termination" *could not* control the meaning of "terminating" in Section 51(701(b)(1) without subjecting various types of IXC access traffic to reciprocal compensation – in express violation of the Commission's stated intent. That is because, if the ISP is the "called party," there would appear to be no basis for concluding that an IXC reached through an access code is not likewise the "called party." And that being the case, the delivery of an access code call to an IXC within the same local service area would necessarily trigger reciprocal compensation obligations, since the functionality is the same as in the delivery of ISP traffic. Even the CLECs concede, however, that the reciprocal compensation provisions of the Act do not apply to long-distance access traffic. Thus, the argument, for all its other flaws, proves too much.

For these reasons, the Commission should reject arguments that Section 51.701(d) – or, by extension, 51.701(b) - are inconsistent with the *Reciprocal Compensation Ruling*. The delivery of ISP traffic does not fit the definition of "termination," and ISP traffic is not local telecommunications traffic in any event. Indeed, to accept these arguments would require a departure from over fifty years of precedent, pursuant to which the "called party" and the point at which a communication "terminates" are both independent of any intermediate switching. There is simply no reason to believe that the Commission ever intended such a result, much less that it would abandon this longstanding precedent without so much as an explanation.

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[41] *See also* Qwest Comments at 7-8. *And see "Analysis of Issues on Remand in ISP Reciprocal Compensation Ruling*, Mark L. Evans and Aaron Panner, Kellogg, Huber, Hansen, Todd, and Evans at 7, attached to USTA Comments..

3. The Status of ISP Traffic as Exchange Access, Telephone Exchange Service, or Otherwise is Irrelevant

Equally specious are CLEC arguments that ISP traffic is telephone exchange service. Nothing in the Act or in the Commission's implementing rules suggests that reciprocal compensation applies to "telephone exchange service." Neither the Act, the relevant rules, nor the relevant paragraphs of the *Local Competition Order* for that matter, even *mentions* the term "telephone exchange service." Rather, as SBC noted in its Comments, the applicability of reciprocal compensation depends on whether a carrier is terminating local telecommunications traffic.[42]

Significantly, while the CLECs devote page upon page of their comments challenging the *Advanced Services Remand Order* and arguing that ISP traffic fits the definition of telephone exchange service,[43] not one of them devotes so much as a sentence to explaining why this

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[42] Because the issue of whether ISP traffic fits the definition of telephone exchange or exchange access is a red herring, SBC does not address that issue here. It notes, however, that the Commission and the CLECs have never considered IP telephony in their consideration of the status of ISP traffic. IP telephony is one of the services available to a consumer when she logs on to the Internet. That, in itself, means that ISP traffic is exchange access traffic. It does not matter that the Internet connection may be used for other types of Internet activities: *one of the* purposes of the connection may be to originate or terminate a telephone call over the Internet for which separate fees are assessed. Nothing in the definition of exchange access suggests that the local exchange facilities at issue must be used *exclusively* for the origination or termination of telephone toll service. Thus irrespective of the merits of the rationale in the *Advanced Services Remand Order*, there is an independent reason why ISP bound traffic is exchange access traffic.

[43] The grounds, moreover, on which they contest the *Advanced Services Remand Order* are suspect. For example, WorldCom argues that calls to ISPs cannot be exchange access because the subscriber does not receive a separate charge, as required in the definition of "telephone toll service." WorldCom Comments at 11. But the statute defines telephone toll service as calls for which there is a separate charge; it does not require that the subscriber be the one that is charged. Moreover, end users pay indirectly for the telephone toll services used by the ISP through the Internet subscribership fees they pay their ISP.

WorldCom argues, further, that calls to ISPs cannot be exchange access because they involve "two separate and distinct services – a telecommunications service provided to the